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IN THE SUPREME COURT OF THE UNITED STATES

FREQUENT FLYER DEPOT, INC., GEORGE PIRKLE AND ROBERT PIRKLE,

Petitioners,

vs.

AMERICAN AIRLINES, INC.

Respondent.

On Petition for a Writ Of Certiorari
to the Court of Appeals, Second District of Texas

REPLY TO BRIEF IN OPPOSITION OF RESPONDENT AMERICAN AIRLINES

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Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle ("Frequent Flyer Depot") reply to American Airlines' ("American") Brief in Opposition.

REPLY TO JURISDICTION

American contests this Court's jurisdiction. The issue presented to the Court relates to federal preemption of state law by 49 U.S.C. §41713(b)(1) in the context of a temporary injunction issued by a state court.

As American noted, this Court has created several exceptions to the requirement of a final judgment for an appeal. There are a growing number of cases in which the federal issue has been decided regardless of continuing state law issues. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477-8 (1975).

One type of case enumerated in *Cohn* where jurisdiction is exercised regardless of continuing state law issues is

> [W]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state

> proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy...

Id. at 482-3. Clear federal policy has been expressed in 49 U.S.C. § 41713(b)(1).

In *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971) the Court reviewed a state court temporary injunction. Chief Justice Brennan wrote:

> The injunction is termed a "temporary" injunction by the Illinois courts. We have therefore considered whether we may properly decide this case. 28 U. S. C. § 1257. We see nothing in the record that would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality. Moreover, the temporary injunction here, which has been in effect for over three years, has already had marked impact on petitioners' First Amendment rights. Although the record in this case is not such as to leave the matter entirely free from doubt we conclude we are not without power to decide is case.

The differences in this case are that the subject temporary injunction has been only been in place for 17 months and the marked impact is upon Frequent Flyer Depot's financial health.

The exercise of this Court's jurisdiction is appropriate where, as here, the issue presented involves the asserted preemption of law that would, regardless of any further factual development or proceedings, be outcome determinative. *Local No. 438 Constr. & General Laborers' Union, AFL-CIO, v Curry,* 371 U.S. 542, 549 (1963) The Court held in *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 fn. 5 (1983):

> The judgment of the Kentucky Court of Appeals is final within the meaning of 28 U.S.C. § 1257: it finally disposed of the federal pre-emption issue; a reversal here would terminate the state-court action; and to permit the proceedings to go forward in the state court without resolving the pre-emption issue would involve a serious risk of eroding the federal statutory policy of "'requiring the subject matter of respondents' cause to be heard by the . . . Board, not by the state courts.'" Or as JUSTICE REHNQUIST put it, our jurisdiction in *Curry* rested on the "understandable principle that where the proper forum for trying the issue joined in the state courts depends on the resolution of the federal question raised on appeal, sound judicial administration requires that such a question be decided by this Court, if it is to be decided at all, sooner rather than later in the course of the litigation"

(Citations omitted).

This Court should exercise its jurisdiction and grant the Petition for Writ of Certiorari.

REPLY TO FACTS

The issue presented to this Court is whether American's tort claims are preempted by 49 U.S.C. § 41713(b)(1). The facts necessary to resolve this issue are undisputed and are identical to those that would be presented after a trial.[1]

American describes Frequent Flyer Depot in inflammatory terms[2] and focuses on matters irrelevant to preemption. American presents the Airline Deregulation Act as an airline protection act. Opposition, page 23. American predicts dire consequences if Frequent Flyer Depot is correct, including subjecting a defenseless American to crimes such as counterfeiting tickets. Opposition, page 16. Frequent Flyer Depot committed no crimes. American equates breaches of its AAdvantage terms and conditions with crimes. These are non-issues.

The issues presented involve the application of 49 U.S.C. § 41713(b)(1) to American's claims arise

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[1] There are fact issues, but the core facts that American seeks to prevent the sale and barter of frequent flyer miles and Frequent Flyer Depot brokers the sale and purchase of frequent flyer miles will not change.

[2] The plaintiffs in *Am. Airlines v. Wolens* probably had unkind things to say about American for changing its AAdvantage terms retroactively, but, there, as here, those unkind words are irrelevant.

from Frequent Flyer Depot's business of brokering the purchase of American's frequent flyer miles used to fly on American.

49 U.S.C. § 41713(b)(1) is part of the Airline Deregulation Act, which places "maximum reliance on competitive market forces" to further "efficiency, innovation, and lower prices," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), To avoid the application of 49 U.S.C. § 41713(b)(1), American argues that Frequent Flyer Depot does not compete with American. American also complains that Frequent Flyer Depot uses American's frequent flyer program to purchase tickets to fly on American at prices lower than those offered by American.[3] Opposition, page 5. This is competition. The temporary injunction prevents this competition.

THE TEXAS COURT OF APPEALS ERRED

American states that Frequent Flyer Depot argues that the identity of the person against whom the claim is made is the sole consideration of a claim for preemption under 49 U.S.C. § 41713(b)(1). This not Frequent Flyer Depot's position. Frequent Flyer Depot argues where a state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier" that law is preempted. Frequent Flyer Depot's focus is dictated by the ruling of the Texas Court of Appeals.

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[3] American created this peculiar situation. According to American, a consumer using Frequent Flyer Depot's services can purchase American frequent flyer miles, pay Frequent Flyer Depot a fee of $1,200 and still purchase tickets at a price "much less" than the price charged by American. Opposition, page 5.

Absent factors relied upon by the Texas Court of Appeals, there is no question that American's claims are preempted. American relies on common law to find and enforce the duties it alleges Frequent Flyer Depot has breached. If 49 U.S.C. § 41713(b)(1) applies, the common law is preempted. *Smith v. Comair Inc.*, 134 F.3d 254, 257-8 (4th Cir. 1998); *Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1435 (7th Cir. 1998); *Ill. Corp. Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989); *Continental Airlines, Inc. v. United Air Lines, Inc.*, 120 F. Supp. 2d 556, 571, fn 30 (E.D. Va. 2000) The *Smith* court held that "when a contract claim cannot be adjudicated without resort to outside sources of law, the claim is still preempted by the ADA." 134 F.3d at 257. This Court held that state laws applicable to frequent flyer miles relate to an airline's prices, routes and services and are preempted. *Am. Airlines v. Wolens*, 513 U.S. 219 (1995). If comparable Texas common law tort claims were made against American with regard to its frequent flyer miles, those claims would be preempted. *Id.*

Thus, there must be another factor that precludes the preemption of American's claims against Frequent Flyer Depot. Frequent Flyer Depot expresses the issue by asking whether the preemption only applies to certificated air carriers, the preemption issue has only arisen in this Court in the context of certificated air carriers. American focuses upon the impact of the state law and its regulatory effect. In either event, the issue relates to how the 49 U.S.C. § 41713(b)(1) preemption should apply to persons other than air carriers.

In cases cited by Frequent Flyer Depot, the lower courts considered complained of activities in the context of air transportation, found the effect precluded by 49 U.S.C. § 41713(b)(1) and preempted the claims without regard to the identity of the person against whom the claim was made. *See Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282 (5th Cir. 2002), *cert. denied* 537 U.S. 1044 (2002) (computer reservation system); *Fed. Express Corp. v. Cal. Pub Util. Comm'n.*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied* 504 U.S. 979 (1992) (trucking operations of an air carrier); *Huntleigh Corp. v. La. State Bd. of Private Sec. Examiners*, 906 F. Supp. 357 (M.D. La. 1995) (company providing passenger pre-departure clearance); *Marlow v. AMR Serv. Corp.*, 870 F. Supp. 295 (Haw. 1994) (jetbridge operator); *Cont'l Airlines, Inc. v. Am. Airlines*, 824 F. Supp. 689 (S.D. Tex. 1993) (airlines' parent).

The Texas Court of Appeals found something more to lead it to conclude the 49 U.S.C. § 41713(b)(1) preemption does not apply to American's claims against Frequent Flyer Depot. No agreement precludes Frequent Flyer Depot from acting as it does. American claims to have contracts with members of its AAdvantage frequent flyer program. American seeks to force Frequent Flyer Depot to abide by the terms of those purported agreements through state law tort claims.

Texas Court of Appeals concluded that American's claims are not preempted because its claims have no impermissible regulatory effect on American. According to the Texas Court of Appeals, the restrictions have no impermissible impact

because the restrictions are contained in an agreement which contains American's "self-imposed obligations." The Texas Court of Appeals held:

> American's invoking the benefits and protections of state law to protect its own agreements does not have the same impermissible regulatory effect upon prices, routes, or services that Congress was concerned with in enacting section 41713(b)(1). The Act was intended to pre-empt only those state actions having a regulatory effect upon the airlines rather than to preclude airlines from seeking the benefits and protections of state law to enforce their self-imposed standards, regulations, and contracts.

Frequent Flyer Depot v Am. Airlines, Inc., 281 S.W.3d 215, 221 (Tex. App.—Fort Worth 2009, pet. denied), *pet. for writ of cert. pending.*

The Texas Court of Appeals' analysis contains a syllogistic fallacy: (a) clauses in the agreement restricting American can be enforced, (b) clauses in the agreement restrict persons other than American, therefore, (c) clauses in the agreement can be enforced against persons other than American. The Texas Court of Appeals' analysis is remarkably similar to the rejected logic of the Illinois Supreme Court in *Wolens v. Am. Airlines, Inc.,* 157 Ill. 2d 466; 626 N.E.2d 205, 208 (1993), *rev'd Am. Airlines, Inc. v. Wolens,* 513 U.S. 219 (1995).

The Texas Court of Appeals' analysis conflicts with the analysis in *Cont'l Airlines, Inc. v. United Airlines, Inc.,* 120 F. Supp. 2d 556 (E.D. Va. 2000),

where the court concluded 49 U.S.C. § 41713(b)(1) preempted tortious interference claims made by one airline against another airline. *Id.* at 571-572. The District Court did not consider the fact that the airline was seeking to "protect the vitality of its self-imposed obligations" in its analysis. The court's analysis was whether the airline's state law claim related to the prices, services or routes of an air carrier. *Id.*

The Texas Court of Appeals' analysis should have stopped with this Court's holding in *Am. Airlines v. Wolens* and a finding of preemption, but the Texas Court of Appeals went further.

Effectively, the Texas Court of Appeals held that since American seeks to enforce restrictions which are part of an agreement that also contains "self-imposed obligations," the imposition through tort law of the restrictions on strangers to the contract have no regulatory effect. Beyond being a logical fallacy, the holding conflicts with cases where tort claims founded on a contractual relationship made by an airline against another airline are preempted. *See United Airlines, Inc. v. Mesa Airlines, Inc.,* 219 F.3d 605 (7th Cir.) *cert. denied,* 531 U.S. 1036 (2000).

To conclude, the arguments advanced by Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle and American Airlines in this Court and in the lower courts demonstrate the need for additional working out of the scope of 49 U.S.C. § 41713(b)(1). *Am. Airlines v. Wolens,* 513 U.S. at 234-5. The Petition for Writ of Certiorari provides the proper setting for this "working out."

Respectfully submitted,

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